

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH WAYNE RICH,

Petitioner,

No. CIV S- 05-0892 MCE GGH P

vs.

ROSEANNE CAMPBELL, Warden,

Respondent.

ORDER

Petitioner, proceeding with appointed counsel, has filed a petition pursuant to 28 U.S.C. §2254. On February 2, 2006, petitioner's December 27, 2005 motion to stay and abey the petition pending state court exhaustion of newly identified claims came on for hearing. Carolyn Wiggin appeared for petitioner. Susan Bunting represented the respondent. After oral argument, the matter was submitted, and the court informed the parties that a stay would be recommended.

However, prior to this court's issuance of Findings and Recommendations with respect to petitioner's motion to stay, petitioner filed an unopposed motion, on February 17, 2006, seeking to withdraw the motion to stay and stating that petitioner elected not to proceed to exhaust newly identified claims¹ or even to proceed on all of the exhausted claims that were set

¹ Petitioner had identified thirteen such unexhausted claims. See Motion to Stay, pp. 6-10.

1 forth in the first amended petition. This new matter has been set for hearing on March 30, 2006.

2 Petitioner has submitted as Exhibit A, a proposed second amended petition, which
3 sets forth only one claim on which petitioner now elects to proceed: by imposing an upper-term
4 sentence, the trial court violated petitioner's constitutional rights under the Sixth and Fourteenth
5 Amendments, as discussed in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v.
6 Washington, 542 U.S. 296 (2004). This claim is the first of five set forth in the first amended
7 petition.

8 For the sake of clarity and because the motion is unopposed, the court will grant
9 petitioner's motion to file a second amended petition, which sets forth only the single remaining
10 claim. The need for a hearing on the motion having been rendered moot, the unopposed motion
11 to waive oral argument will also be granted. The timeline for subsequent filings is also set
12 forth.²

13 Accordingly, IT IS ORDERED that:

14 1. Petitioner's unopposed motion, filed February 17, 2006, to withdraw
15 petitioner's motion for stay and abeyance of the first amended petition is granted, and the
16 December 27, 2005 motion to stay is vacated;

17 2. Petitioner's unopposed motion, filed February 17, 2006, to file a second
18 amended petition and proceed only on the exhausted claim therein set forth is granted;

19 3. The parties' request that oral argument be waived on the February 17, 2006
20 unopposed motion is granted, any hearing having been rendered moot by this order, and the
21 March 30, 2006 hearing date is vacated from the court's calendar;

22 4. The Clerk of the Court is directed to docket, file, or entered as filed, the
23 proposed second amended petition, Exhibit A to petitioner's February 17, 2006 motion, so that it
24 becomes the operative second amended petition filed as of the date of this order;

25
26 ² These deadlines were initially set by Order, filed on September 26, 2006.

